

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**Company Appeal (AT) (Ins) No.670 of 2019**

**IN THE MATTER OF:**

**Sales Tax Department,  
State of Maharashtra**

**...Appellant**

**Versus**

**Calyx Chemicals and Pharmaceuticals Ltd. & Ors. ...Respondents**

**For Appellant: Shri Prashant S. Kenjale, Advocate**

**For Respondents: Shri Abhijeet Sinha, Ms. Mahima Singh and Shri  
Saikat Sarkar, Advocates (R-1 to R3)  
Ms. Meera Murali, (for RP)**

**With**

**Company Appeal (AT) (Ins) No.991 of 2019**

**IN THE MATTER OF:**

**Commissioner of Customs, NS-II**

**...Appellant**

**Versus**

**Calyx Chemicals and Pharmaceuticals Ltd. & Ors. ...Respondents**

**For Appellant: Shri Harpreet Singh, Sr. Standing Counsel with  
Ms. Suhani Mathur, Advocate**

**For Respondents: Shri Abhijeet Sinha, Ms. Mahima Singh and Shri  
Saikat Sarkar, Advocates (R-1, 4 and 5)  
Ms. Meera Murali, (for RP)**

**O R D E R**

**06.12.2019** We have heard the Counsel for both sides in these two Appeals. The first Appeal has been filed by the Sales Tax Department. There was a CIRP process initiated against Respondent No.1 - Calyx Chemicals and

Pharmaceuticals Ltd. and which came up before the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in CP No.1554/I&BC/MB/MAH/2017 and in which Resolution Plan was submitted by a consortium of Respondent Nos.2 and 3 which has been accepted and has been acted upon and Respondents 2 and 3 stepped into the shoes of the Corporate Debtor. Company Appeal (AT) (Ins) No.670 of 2019 has been filed by the Sales Tax Department claiming that it had dues outstanding of Rs.31,90,47,310/- which arose out of statutory liability and which amounts have been collected by the dealer during his trade practice which was bound to be paid to the Government Treasury. The Appellant points out that it had taken various steps to recover the outstanding dues by resorting to the Appeal before the Commissioner/s of Sales Tax. Thereafter, the CIRP process started and the Sales Tax Department had lodged claim of the sales tax dues to the IRP. It is stated that in the Resolution Plan, which has been accepted, there has been made a reduction of the claim of the amount. The VAT/Statutory amount of Rs.21,12,49,000/- has been reduced to Rs.45,00,000/- which is 2.1% only of the outstanding dues which had been claimed.

2. In Company Appeal (AT) (Ins) No.991 of 2019, the same has been filed by Commissioner of Customs with regard to the same Resolution Plan which has been accepted and it is claimed that the Resolution Plan has been approved prejudicial to the rights of the Appellant. The Commissioner of Customs has raised dispute that Union of India is not an Operational Creditor and Customs Duty or Central Goods and Service Tax do not come within the

definition of operational debt and the same could not be reduced to 2.5% as has been done in the Resolution Plan.

3. When these matters had come up before us on 13<sup>th</sup> November, 2019 in view of the submissions in para – 5 of the Order, we had raised the following issues with regard to the Sales Tax dues:-

- “a) When Sales Tax is recovered by Seller and Sales Tax recovered is in the hand of Seller, can it be said to be Operational Debt in terms of Section 5(21) of IBC? Or,
- b) Is it held by the Seller in trust for the Government and not “asset” of the Seller as per explanation given below Section 18 of IBC and also keeping in view Section 36(4) of IBC?”

4. We have heard respective counsel for both sides in these Appeals. The learned Counsel for the Sales Tax has taken us to Maharashtra Value Added Tax Act – Sub-Section 20 to state that the dealer concerned has to recover the sales tax as per the rates which have been fixed under the Act and at the end of the year, it is required to do self-assessment of the tax recovered and to pay the same to the Government. Section 37 has been relied on to state that the Sales Tax Department has first charge on the property.

Chapter V Sub-Section (20) and (21) of Maharashtra Value Added Tax Act (Levy and Amendment) Act, 2005 read as follows:-

“20. (1)(a) Every registered dealer shall file correct, complete, self-consistent return in such form, by such date, for such period and to such authority as may be prescribed. Different types of returns may be prescribed for different classes of dealers.

(b) The Commissioner may examine the return to ascertain whether it is complete and self-consistent. If

the return is not complete or self-consistent, the Commissioner may serve on the dealer, within four months of date of filing of the return, a defect notice in the prescribed form. The said registered dealer shall correct the defects and submit to the prescribed authority a fresh, complete and self-consistent return within one month of the service of the defect notice:

Provided that the registered dealer who fails to submit a complete or self consistent fresh return within the said period of one month shall be deemed not to have submitted the return within the prescribed time as required under clause (a)

(2) Notwithstanding anything contained in sub-section (1), the Commissioner may, subject to such terms and conditions, as may be prescribed, permit any dealer, --

(a) to furnish returns for such different period, or

(b) to furnish a consolidated return relating to all or any of the places of business of the dealer in the State for such period or periods, to such authority, as he may direct.

(3) Every person or an unregistered dealer who is required to file a return under any other provision of this Act, shall file such return for such period, in such form, by such date and to such authority as may be prescribed and the provisions contained in paragraph (b) of sub-section (1) shall apply to such return as they apply to the return prescribed under paragraph (a) of sub-section (1).

(4) Any person or dealer who, having furnished a return under sub-section (1), (2) or (3) discovers any omission or incorrect statement therein, may furnish a revised return in respect of the period covered by the return at any time before a notice for assessment is served on him in respect of the period covered by the return or before the expiry of a period of six months from the end of the year containing the period to which the return relates, whichever is earlier.

21. (1) Where a return is filed by the prescribed date by a registered dealer no notice calling the dealer for assessment in respect of the period covered by the return shall be served on the dealer after two years from

the end of the year containing the period to which the return relates.

(2) Where a registered dealer has not filed a return in respect of any period by the prescribed date, no notice calling the dealer for assessment in respect of the said period shall be served on the dealer after three years from the end of the year containing the said period :

(3) Notwithstanding anything contained in sub-section (1) or (2), a notice for assessment in respect of any period ending on or before the 31<sup>st</sup> March 2008, may be served on the dealer within a period of four years from the end of the year containing the said period.”

Section 5, Sub-Section (21) of IBC states with regard to “operational debt” that a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority, the liability is in the nature of operational debt. Looking to the issues which had been raised, we observe that we have not received sufficient assistance with regard to the issues and in present matter, we are not deciding the same.

5. In the matter of **“Pr. Director General of Income Tax (Admn. & TPS) Vs. M/s. Synergies Dooray Automotive Ltd. & Ors.”** in Company Appeal (AT) (Insolvency) No. 205 of 2017, Bench of this Tribunal had referred to the Judgement of Hon’ble Supreme Court in the matter of **“Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.— Writ Petition (Civil) No. 99 of 2018”** and further discussed the nature of these dues in Paragraphs - 22 to 30, which read as under:-

**“27. In “Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.— Writ Petition (Civil) No. 99 of 2018”, the Hon’ble Supreme Court while dealing with**

the different provisions of the 'I&B Code', including Section 5(20), observed as follows:

*“23. A perusal of the definition of “financial creditor” and “financial debt” makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an ‘operational debt’ would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.”*

28. From the plain reading of sub-section (21) of Section 5, we find that there is no ambiguity in the said provision and the legislature has not used the word 'and' but chose the word 'or' between 'goods or services' including employment and before 'a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, and State Government or any local authority'.

29. 'Operational Debt' in normal course means a debt arising during the operation of the Company ('Corporate Debtor'). The 'goods' and 'services' including employment are required to keep the Company ('Corporate Debtor') operational as a going concern. If the Company ('Corporate Debtor') is operational and remains a going concern, only in such case, the statutory liability, such as payment of Income Tax, Value Added Tax etc., will arise. As the 'Income Tax', 'Value Added Tax' and other statutory dues arising out of the existing law, arises when the Company is operational, we hold such statutory dues has direct nexus with operation of the Company. For the said reason also, we hold that all statutory dues including 'Income Tax', 'Value Added Tax' etc. come within the meaning of 'Operational Debt'.

30. For the said very reason, we also hold that 'Income Tax Department of the Central Government'

and the 'Sales Tax Department(s) of the State Government' and 'local authority', who are entitled for dues arising out of the existing law are 'Operational Creditor' within the meaning of Section 5(20) of the 'I&B Code'."

6. Reading Section 5(20) and (21) of IBC, these dues raising liability to pay under the VAT Act or Customs Duty in the light of above Judgement is treated as operational debt.

7. The Hon'ble The Supreme Court of India in the matter of "**Committee of Creditors of Essar Steel India Limited Satish Kumar Gupta & Ors.**" in Civil Appeal No. 8766-67 of 2019 in Judgement dated 15<sup>th</sup> November, 2019 in paragraph – 46 has discussed how the Resolution Plan has to be dealt with while considering payment to Operational Creditors and observed that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors but the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the Corporate Debtor and the fact that it has adequately balanced the interests of all stakeholders including Operational Creditors. In the present Appeals, the Impugned Order has referred to the Resolution Plan and its contents in para – 5 of the Order and it can be seen that the Resolution Plan has while dealing with stakeholders including statutory claims and dues balanced the interests. We do not find any reason to interfere with the Resolution Plan as has been approved by the Adjudicating Authority.

Both the Appeals are thus disposed of without disturbing the Impugned Order passed. No order as to costs.

[Justice A.I.S. Cheema]  
Member (Judicial)

[Kanthi Narahari]  
Member (Technical)

[V.P. Singh]  
Member (Technical)

*/rs/md*